APPENDIX 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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71 Civ. 1917

In the Matter of the Arbitration of Certain Differences Between

AAACON AUTO TRANSPORT, INC.,

Petitioner,

-and-

J. WAYLAND THOMAS and CORA G. THOMAS,

Respondents.

MEMORANDUM

APPEARANCES:

ZOLA & ZOLA, ESQS.
1472 Broadway
New York, New York 10036
Attorneys for Petitioner
Of Counsel: MICHAEL G. AMES, ESQ.

LaGINESTRA & DONNELLY, ESQS.
27 Cedar Street
New York, New York 10038
Attorneys for Respondents
Of Counsel: NICHOLAS M. LaGINESTRA, ESQ.

LASKER, D.J.

Pursuant to 9 U.S.C. §4, petitioner, Aaacon Auto Transport ("Aaacon"), seeks to compel arbitration of differences between it and respondents arising out of the interstate transportation by Aaacon of respondent's car in the course of which the car was damaged. Respondents seek dismissal of the petition on the grounds that 1) this Court lacks subject matter jurisdiction; and 2) the bill of lading agreement which is the basis of the petition is invalid, because it is in conflict with the governing statute (49 U.S.C. §20(11), originally the Carmack Amendment) and the Interstate Commerce Commission ("I.C.C.") regulations promulgated thereunder.

The first ground must be rejected. Subject matter jurisdiction over the petition is vested in this Court without regard to amount in controversy by 28 U.S.C. §1337. *Peyton v. Railway Express Agency, Inc.*, 316 U.S. 350 (1942); *Bernstein Bros. Pipe and Machinery Co. v. Denver & R.G.W.R. Co.*, 193 F. 2d 441 (10th Cir. 1951); *Aaacon Auto Transport, Inc., v. Teafatiller*, 334 F. Supp. 1042 (S.D.N.Y. 1971). Accordingly, this Court also has jurisdiction under 9 U.S.C. §4.

This determination, however, is merely the beginning of the inquiry. Respondents contend that the bill of lading agreement between them and Aaacon is in conflict with the I.C.C.'s Uniform Straight Bill of Lading, promulgated pursuant to 49 U.S.C. §20(11), and the agency's other regulations governing the interstate transportation of motor vehicles in that it provides that the shipper consents to the jurisdiction of the New York courts together with personal service by mail and agrees to arbitrate all claims in the State of New York and in that, in a variety of ways, it

limits Aaacon's liability in case of loss of or damage to the vehicle. Aaacon argues the contrary, relying in part on the fact that its claims procedures have been filed with the Commission pursuant to its requirements and have not been repudiated by the Commission. Thus, the case is in a posture which is strikingly similar to the situation in *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.*, 360 U.S. 411 (1959), in which the Court held that before a district court strikes down a contractual relationship which is subject to I.C.C. control, the parties should be afforded an opportunity to obtain a preliminary determination of the issues involved from the agency. *Id.* at 421. The Court instructed that the district court proceeding should be held in abeyance pending the outcome of the agency determination. *Id.* at 421-22.

The Court held that this procedure should be followed regardless of the fact that the questions presented might ultimately require judicial determination. The Court stated:

> "We may assume that the question whether a clause of this kind offends against public policy is one appropriate ultimately for judicial rather than administrative resolution. But that does not mean that the courts must therefore deny themselves the enlightenment which may be had from a consideration of the relevant economic and other facts which the administrative agency charged with regulation of the transaction here involved is peculiarly well equipped to marshal and initially to evaluate." *Id.* at 420.

The Court quoted with approval the often cited passage in *Far East Conference v. United States*, 342 U.S. 570 (1952)

which states the reasons underlying judicial deference to administrative decision-making:

> "Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." *Id.* at 574-75; *accord, River Terminals, supra,* at 421.

These factors play as significant a role, here, as in *River Terminals,* and the rule enunciated in that case applies.

Unlike the parties in *River Terminals,* however, the litigants before us will not be obliged to commence an inevitably lengthy administrative proceeding as a result of this decision. A proceeding involving the same issues as are raised by this litigation has already been commenced against Aaacon by the Bureau of Enforcement of the I.C.C. and is, in fact, nearing completion. Respondents are willing merely to await its outcome without personally participating in it (affidavit of Nicholas LaGinestra, attorney for respondents, of February 8, 1973); Aaacon is, of course, a party to it and, therefore, is in a position to protect its interests before the agency.

Accordingly, we deny the motion to compel arbitration and hold the petition in abeyance pending the outcome of the I.C.C. proceedings.

It is so ordered.

Dated: New York, New York
June 14th, 1973.

s/ Morris E. Lasker
U.S.D.J.

APPENDIX 2

ENDORSEMENT

AAACON AUTO TRANSPORT v. J. WAYLAND THOMAS, 71 Civ. 3917

LASKER, D.J.

By memorandum dated June 14, 1973, we denied Respondents' motion to dismiss and Petitioner's motion to compel arbitration on the ground that decision of these motions should properly await the outcome of proceedings before the Interstate Commerce Commission. Petitioner informally moved to reargue. Subsequent to their application, the Commission rendered its decision, which upholds in every respect the contentions made by Respondents as to the invalidity of the bill of lading agreement on which the petition is based. No. MC-C-7287 (November 15, 1973).

While the Commission's decision supports our denial of Petitioner's motion to compel arbitration, it removes the reason for denying Respondents' motion to dismiss and we note that renewal of that motion would now be appropriate.

Petitioner's motion to reargue is denied.

It is so ordered.

Dated
New York, New York
December 10th, 1973.

MORRIS E. LASKER
U.S.D.J.

APPENDIX 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURT HOUSE
NEW YORK, N.Y. 10007

Chambers of
JUDGE MORRIS E. LASKER

March 14th, 1974

TO: All Counsel

RE: Aaacon Auto Transport, Inc. v. J. Wayland Thomas and Cora G. Thomas 71 Civ. 3917

Since the decision rendered by the Administrative Law Judge of the Interstate Commerce Commission (No. MC-C-7287) is not a final determination by the Commission, we believe that it would be appropriate to defer action on defendants' motion to dismiss until such time as the Commission renders a final decision.

The parties are instructed to acquaint the Court with any further agency actions relevant to the case.

Sincerely,

s/Morris E. Lasker

MEL/cw
Zola and Zola, Esqs.
LaGinestra & Donnelly, Esqs.

APPENDIX 4

74-1548
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

In The Matter of
The Application of AAACON Auto Transport, Inc.,
Petitioner,

v.

Hon. Morris E. Lasker, United States District Judge for the Southern District of New York,
Respondent.

in the matter of the arbitration of certain differences between
Aaacon Auto Transport Inc.,
Petitioner,

v.

J. Wayland Thomas & Cora G. Thomas,
Respondents.

A petition for a writ of mandamus having been filed

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Further ordered that the Clerk shall serve a copy of this order on the Judge named respondent and on all other parties to the action in the trial court.

s/Sterry R. Waterman
Sterry R. Waterman

s/Henry J. Friendly
Henry J. Friendly

s/William H. Mulligan
William H. Mulligan

May 3, 1974

APPENDIX 5-a

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of July, one thousand nine hundred and seventy-four.

Present:

HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
HON. WILLIAM H. MULLIGAN,

Circuit Judges.

74-1548

In the Matter of
The Application of Aaacon Autor Transport, Inc.,
Petitioner,

v.

Hon. Morris E. Lasker, United States District Judge for the Southern District of New York,
Respondent.

A petition for a rehearing having been filed herein by counsel for the petitioner,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

s/A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

APPENDIX 5-b

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the First day of July, one thousand nine hundred and seventy-four.

74-1548

In the Matter of
The Application of Aaacon Auto Transport, Inc.,
Petitioner,

v.

Hon. Morris E. Lasker, United States District Judge for the Southern District of New York,
Respondent.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioner, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

s/Irving R. Kaufman
Chief Judge
IRVING R. KAUFMAN